



Paper No. 4

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In re Application of:
HEHENBERGER, RODNEY K., *et al.*
Application No. 09/369,410
Filed: 08/03/1999
Attorney Docket No. 54982US1A002

**OFFICE OF PETITIONS
A/C PATENTS
DECISION ON
PETITION**

This is a decision on the petition under 37 C.F.R. §1.10(d) or, in the alternative, 37 C.F.R. §1.10(c) or, in the alternative, under 37 C.F.R. §1.182 or 37 C.F.R. §1.183 for correction of the filing date and issuance of a corrected filing receipt, filed on August 3, 1999.

THE RULE

37 C.F.R. § 1.10 Filing of correspondence by "Express Mail."

(a)...

(b)...

(c) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that there is a discrepancy between the filing date accorded by the Office to the correspondence and the date of deposit as shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation, may petition the Commissioner to accord the correspondence a filing date as of the "date-in" on the "Express Mail" mailing label or other official USPS notation, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail;" and

(3) The petition includes a true copy of the "Express Mail" mailing label showing the "date-in," and of any other official notation by the USPS relied upon to show the date of deposit.

(d) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the U.S.P.S., may petition the Commissioner to accord the correspondence a filing date as of the date the

correspondence is shown to have been deposited with the USPS, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and
- (3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

...

ANALYSIS

A petition under either rule 10(c) or rule 10(d) requires that the petition be "filed promptly after the person becomes aware that the Office has accorded or will accord a filing date based upon an incorrect entry by the USPS."¹ This application was filed either on August 3, 1999, or August 5, 1999, depending on whose evidence you reference. This petition was filed on September 6, 2000, which is roughly a year and one month after the date of the filing of the application. While there is admittedly little guidance as to what the meaning of the term "promptly" is, extending the term to cover the span of time that Petitioner took in this case to file a petition would stretch the concept too far. In the absence of any proof as to when Petitioner first became aware of the alleged discrepancy between the accorded filing date and the actual filing date, the office must presume that Petitioner became aware of the discrepancy at least as early as the date that the filing receipt was issued (August 26, 1999). A delay of a year is not prompt enough, and therefore *the petitions under rules 10(c) and (d) must be dismissed* for failure to comply with that requirement.

Both rule 10 arguments are dismissable on other grounds as well.

As for the argument under rule 10(d), it is noted that none of the evidence provided satisfies the requirement of rule 10(d)(3). While the evidence is persuasive, the office must hold Petitioner for satisfying the requirements of the rules. Rule 10(d)(3) clearly requires support from corroborating evidence either from the USPS or that was created within one day after the day of deposit on the requested date. None of Petitioner's corroborating evidence provided could be said to be of that nature.

As for the petition under rule 10(c), requirement (3) of that rule requires that a copy of the Express Mail label be included with the petition so that the office can determine that there

¹ See, 37 C.F.R. §1.10(c)(1) and (d)(1).

is indeed a discrepancy between the date accorded and the date of deposit. While Petitioner has included a copy of said Express Mail label, the date on the label corresponds with the date accorded. Therefore, this evidence does not aid Petitioner's rule 10(c) petition because it appears to validate the currently accorded filing date of August 3, 1999.

As for Petitioner's argument under rule 1.182, the relief requested must be **dismissed** because this is clearly not a question that is not specifically provided for. Rule 10 clearly addresses this issue, and Petitioner's inability to make a successful rule 10 argument at this time does not render this a question not specifically provided for.

As for Petitioner's claim for relief under rule 1.183, a favorable ruling would be premature at this point. Petitioner still has the option of curing the defect in satisfying rule 10(c)(1) or 10(d)(1) by showing that he wasn't aware of the filing date issue until more recently than has been presumed in this decision. Petitioner also needs to provide evidence that would cure the other problems noted in the decisions on the rule 10 arguments. Until a successful argument under rule 10 has been precluded absolutely, a decision to suspend the rules in the interest of justice would be premature. Therefore, that argument is **dismissed** as well.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 C.F.R. §1.136(a) are permitted. 37 C.F.R. §1.137(d). The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. §1.137(b)".

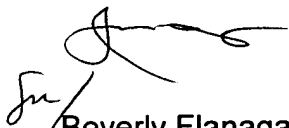
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Telephone inquiries concerning this matter may be directed to Petitions Attorney Scott M. Ledford in the Office of Petitions at (703) 306-5593.



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